

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

49 CFR Parts 653 and 654

[Docket No. 92-H or I]

RIN 2132-AA37; 2132-AA38

Prevention of Prohibited Drug Use in Transit Operations; Prevention of Alcohol Misuse in Transit Operations

AGENCY: Federal Transit Administration, DOT.

ACTION: Final rule.

SUMMARY: The Federal Transit Administration (FTA) is amending its drug and alcohol testing rules to exempt volunteers and eliminate the citation requirement in the non-fatal, post-accident testing provision applicable to non-rail vehicles. This rule is intended to ease administrative burdens and clarify certain provisions in the existing rules.

EFFECTIVE DATE: September 1, 1995.

FOR FURTHER INFORMATION CONTACT: For program issues, Judy Meade, Office of Safety and Security, Federal Transit Administration, telephone: 202-366-2896. For legal questions, Nancy Zaczek or Kristin O'Grady, Office of Chief Counsel, Federal Transit Administration, telephone: 202-366-4011 (voice); 202-366-2979 (TDD). Copies of the regulation are available in alternative formats upon request.

SUPPLEMENTARY INFORMATION: On February 6, 1995, FTA published a Notice of Proposed Rulemaking (NPRM) proposing to amend its drug and alcohol testing rules to (1) exempt volunteers and (2) eliminate the citation requirement in the non-fatal, post-accident testing provision applicable to non-rail vehicles. FTA also sought comment on whether an "accident" should be defined to include the discharge of a firearm by a transit security officer. FTA received 83 comments over a two-month period.

I. Volunteers

Under FTA's current drug and alcohol rules, 49 CFR Parts 653 and 654, a volunteer who performs a safety-sensitive function generally is subject to testing for prohibited drugs and the misuse of alcohol. Since issuance of the final rules in 1994, however, a number of entities have urged the agency to exempt volunteers from application of the rules.

Comments

On the volunteer issue, FTA received 54 comments from large and small

transit operators, one insurance carrier, two U.S. senators, one U.S. representative, and two associations. An overwhelming majority of these commenters (50 of 54) favored exempting volunteers. Only four commenters (two large transit operators, one small transit operator, and one trade organization) opposed exempting volunteers from FTA's drug and alcohol testing rules. The commenters raised a number of key issues:

Volunteers are not likely to be involved in drug or alcohol-caused collisions. Several commenters pointed out that no statistical evidence suggests that volunteer transit drivers have been involved in drug or alcohol-caused collisions. Many small operators stated that they have operated for years without one incident relating to the use of drugs or alcohol. Several operators noted that they already provide a comprehensive screening program that evaluates a volunteer's driving record along with their criminal history. For example, one program requires a medical statement signed by a physician, a vehicle inspection statement signed by a mechanic, proof of insurance, a driver's license print-out, and a code of conduct which includes a statement that the driver will not use mood-altering drugs or alcohol while serving as a volunteer. In addition, this same program requires annual medical and vehicle statements from its existing drivers. Further, commenters claimed that volunteers are generally retired professionals with a heightened level of safety. According to commenters, the majority of volunteers are over 60 years old, community-minded, and not likely to be drug or alcohol users.

People will not volunteer if they must submit to drug and alcohol testing rules. Commenters stated that volunteers consider a drug and alcohol test an invasion of privacy. Since volunteers are not compensated for their services and are not entitled to the benefits that employees receive, volunteers are not likely to submit to drug and alcohol testing requirements. In fact, several commenters stated that some volunteers have indicated that they would not continue to volunteer if they had to submit to a drug or alcohol test. Some commenters claimed that volunteerism is down from last year and argued that required drug and alcohol testing will surely exacerbate this downward trend.

It is costly and impractical for organizations to administer drug and alcohol tests to volunteers. Many volunteers are part-time and serve a variety of functions, e.g. clerical support, in addition to safety-sensitive work. Commenters stated that

segregating these functions would cause administrative havoc. According to a number of commenters, volunteers do not perform safety-sensitive work on a regular and consistent basis. As a result, testing would be difficult to administer. Several commenters argued that the cost of administering these tests would be prohibitive. Some claimed that the cost of providing testing would drain operating budgets and drastically reduce the services that are provided. For example, one commenter estimated that the cost of providing drug testing for its volunteers would exceed \$43,000 per year. This additional cost would translate into 597 fewer rides per month or 7,164 rides per year. Another dimension of the problem would be the cost of losing the use of volunteers' vehicles. A number of commenters indicated that volunteers often provide transportation with their own vehicles. The potential loss of those drivers would place a tremendous hardship on transit providers in rural areas.

Exempting volunteers compromises rider safety. As mentioned above, four commenters believe that exempting volunteer drivers from drug and alcohol testing is contrary to the spirit of the testing mandates of Congress and in direct conflict with safe practice and common sense. One commenter suggested that the exemption compromises safety and erodes the intent of a drug and alcohol-free workplace.

Discussion

FTA agrees with those commenters that favor exempting volunteers from the drug and alcohol testing requirements. Based on the comments submitted to FTA, the significant cost of subjecting volunteers to drug and alcohol testing far outweighs the safety benefits. Commenters indicated that volunteers often are screened by the operator and are mature citizens with good driving records. Furthermore, the costs related to conducting drug and alcohol testing of volunteers are considerable. First, the operator must divert funds from its transportation functions to pay for drug and alcohol testing. Second, the operator may lose volunteers and their vehicles if drug and alcohol testing is required. Third, the time volunteers are able to donate is always limited and would be further restricted by the time consumed by the testing process. Finally, many of the operators that depend heavily on volunteers are small and cannot easily absorb the extra cost that testing volunteers would involve.

As noted above, a few commenters argued that exempting volunteer drivers

from drug and alcohol testing is contrary to the spirit of the testing mandates of Congress in the Omnibus Employee Testing Act of 1991. However, the legislative history of the drug and alcohol testing requirement does not reflect a specific concern about drug and alcohol testing of volunteers. In fact, the tragic accidents that moved Congress to action involved professional transportation employees, not volunteers. See, for example, Conference Report to Accompany H.R. 2942, Department of Transportation and Related Agencies Appropriation Bill, Fiscal Year 1992, in *Congressional Record*, H7672, October 3, 1991.

FTA recognizes that the term "volunteer," as used in the revised definition of "covered employee," could be construed broadly to include any non-employee. FTA's intention in this final rule, however, is to exempt only non-employee volunteers who perform a service as a charitable act without the expectation of receiving a benefit, whether financial or as part of a program established to relieve an obligation. Other non-employees remain covered by the rule, i.e., those who provide charitable service in return for some benefit, for example, in the context of "workfare"-type programs that make public assistance or other benefits contingent on the donation of transportation services or community service programs that confer academic credit or provide an alternative to a criminal sentence. This issue was not raised in the NPRM or in the comments to the docket, but we would consider it in the future if appropriate.

II. Post-Accident Testing

FTA received 20 comments from large and small transit operators on FTA's proposal to eliminate the citation requirement in the non-fatal, post-accident testing provision applicable to non-rail transit vehicles. Currently, 49 CFR sections 653.45(a)(2)(i) and 654.33(a)(2)(i) require a post-accident drug and alcohol test after a non-fatal accident if, among other things, the operator of the mass transit vehicle involved in the accident receives a citation from a State or local law enforcement official. Five large and two small transit operators favored retaining the citation requirement. Eight large and five small transit operators commented that the citation requirement should be eliminated.

Comments

Commenters made the following arguments in favor of eliminating the citation requirement:

Police officers rarely issue citations in time for drug and alcohol testing to be useful. The majority of commenters indicated that law enforcement officials rarely issue citations in non-fatal accidents. When a citation is warranted, often too much time has passed for the testing to be useful. One commenter pointed out that unless an officer witnesses the accident, the officer will want to conduct an investigation before issuing a citation, which means that virtually no post-accident tests are conducted for non-fatal accidents.

Local guidelines sometimes already require testing without a citation. Two large commenters indicated that local guidelines provide for a stricter standard that already requires post-accident testing, even without a citation being issued.

Requiring a citation is inconsistent with the Omnibus Employee Testing Act of 1991. One commenter opined that the Omnibus Transportation Employee Testing Act of 1991 requires that FTA mandate testing, without the citation requirement, to insure that the transit industry is free from employees using illegal drugs and misusing alcohol while performing safety-sensitive functions.

FTA's definition of "accident" should change. Commenters suggested several changes to FTA's definition of "accident" for the purpose of determining when post-accident testing is necessary. It was not FTA's intention to solicit comments on this part of the rule, but rather the part of the rule that currently requires a citation to be issued before post-accident testing occurs.

Commenters made the following arguments in favor of retaining the citation requirement:

The citation requirement is easy to follow. One commenter noted that the citation requirement provides an easily understood benchmark and gives decision-making confidence to supervisors and managers. Another commenter pointed out that the current regulation operates well in that it requires the judgment of law enforcement officials, people who are trained in accident investigation, to assess whether the transit operator's actions contributed to the accident.

The proposed rule would require more testing, which will increase overall costs. One commenter estimated that the proposed rule would require the testing of approximately twenty more individuals a year, adding an additional \$3,000 to their estimated \$70,000 annual cost of conducting drug and alcohol testing. Another commenter pointed out that elimination of the citation requirement will result in

additional unfunded costs that are not in proportion to any expected benefit.

Discussion

FTA agrees with those commenters who favor removing the citation requirement. Because of the delay in issuing a citation in many accidents, the citation requirement renders post-accident alcohol and drug testing virtually ineffective.

Arguments that removing the citation requirement would increase the number of drug and alcohol tests given and increase the cost are not persuasive. The legislative history reveals that Congress intended that post-accident testing of safety-sensitive employees should be required

In the case of any accident in which occurs a loss of human life, or, as determined by the Secretary, other serious accident involving bodily injury or significant property damage. It is not the Committee's intent that drug and alcohol testing should be required every time there is an accident involving a mass transportation operation. Rather, post-accident testing should be limited to those instances in which there is a loss of human life or other accident of sufficient magnitude in terms of bodily injury or significant property damage for which testing for drugs and alcohol would be warranted. Report of the Senate Committee on Commerce, Science, and Transportation, on S. 676, Omnibus Transportation Employee Testing Act of 1991. 102d Congress, 1st Session, Report 102-54 (1991). (Emphasis added.)

Based upon the comments FTA received, the Agency does not believe that the issuance of a citation is the best measure for whether the accident is of sufficient magnitude to warrant drug and alcohol testing. The issuance of a citation depends on several factors, such as whether the law enforcement officer was physically present at the accident scene. These factors are often completely unrelated to the magnitude of the accident. Moreover, the timing of the issuance of a citation is not driven by the requirements of drug and alcohol testing. As a result, by the time a citation is issued, it is often too late to conduct drug and alcohol testing.

The result of requiring a citation as the trigger for a post-accident drug and alcohol test is that too many accidents have not been properly investigated for drug and alcohol-related causes. This amendment is better tailored to accomplish the Congressional intent that all significant, non-fatal accidents should trigger drug and alcohol testing of appropriate personnel.

III. Definition of Accident—Armed Security Personnel

FTA received only seven responses to our request for comment on whether the

definition of "accident" should include the discharge of a firearm by armed security personnel (who are considered safety-sensitive workers subject to the drug and alcohol testing program). Most commenters opposed an amendment to the definition of "accident" to include the discharge of a firearm by a covered employee while on duty. Most of these commenters were transit operators who noted that they already have internal policies and procedures for dealing with accidental discharges of firearms. A few commenters favored including the discharge of a firearm in the definition of "accident," mostly for safety reasons. Since there seems to be little interest in amending the definition of accident to include the discharge of firearms, FTA will not take any action at this time.

IV. Regulatory Process Matters

A. Executive Order 12688

The FTA evaluated the costs and benefits of the drug and alcohol testing rules when it issued 49 CFR parts 653 and 654 on February 15, 1994, at 59 FR 7531-7611. It is not anticipated that the change to the post-accident testing provision should significantly alter the costs and benefits of either part 653 or 654. On the other hand, the exclusion of volunteers from coverage under the rules should slightly lower the overall cost of the program.

B. Departmental Significance

Neither rule is a "significant regulation" as defined by the Department's Regulatory Policies and Procedures, because it involves only minor changes to parts 653 and 654.

C. Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, the FTA evaluated the effects of parts 653 and 654 on small entities when they were issued in February 1994. These changes will not significantly change that analysis, but should reduce the cost of drug and alcohol testing for small entities.

D. Paperwork Reduction Act

This rule does not include information collection requirements subject to the Paperwork Reduction Act.

E. Executive Order 12612

We reviewed parts 653 and 654 under the requirements of Executive Order 12612 on Federalism. These proposed rules, if adopted, will not change those assessments.

F. National Environmental Policy Act

The agency determined that these regulations had no environmental implications when it issued parts 653 and 654, and there will be none under these amendments.

G. Energy Impact Implications

These amendments do not affect the use of energy.

List of Subjects in 49 CFR Parts 653 and 654

Alcohol testing, Drug testing, Grant programs—transportation, Mass transportation, Reporting and recordkeeping requirements, Safety and Transportation.

For the reasons set forth in the preamble, the FTA is amending Title 49, Code of Federal Regulations, parts 653 and 654 as follows:

Part 653—PREVENTION OF PROHIBITED DRUG USE IN TRANSIT OPERATIONS

1. The authority citation for part 653 continues to read as follows:

Authority: 49 U.S.C. 5331; 49 CFR 1.51.

2. The definition of "covered employee" in section 653.7 is revised to read as follows:

§ 653.7 Definitions

* * * * *

Covered employee means a person, including an applicant or transferee, who performs a safety-sensitive function for an entity subject to this part; however, a volunteer is covered only if operating a vehicle designed to transport sixteen or more passengers, including the driver.

* * * * *

§ 653.45 [Amended]

3. The first sentence of § 653.45(a)(2)(i) is amended by removing "if that employee has received a citation under State or local law for a moving traffic violation arising from the accident" and adding "unless the employer determines, using the best information available at the time of the decision, that the covered employee's performance can be completely discounted as a contributing factor to the accident".

PART 654—PREVENTION OF ALCOHOL MISUSE IN TRANSIT OPERATIONS

4. The authority citation for part 654 continues to read as follows:

Authority: 49 U.S.C. 5331; 49 CFR 1.51.

5. The definition of "covered employee" in section 654.7 is revised to read as follows:

§ 654.7 Definitions

* * * * *

Covered employee means a person, including an applicant or transferee, who performs a safety-sensitive function for an entity subject to this part; however, a volunteer is covered only if operating a vehicle designed to transport sixteen or more passengers, including the driver.

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§ 654.33 [Amended]

6. The first sentence of § 654.33(a)(2)(i) is amended by removing "if that employee has received a citation under State or local law for a moving traffic violation arising from the accident" and adding "unless the employer determines, using the best information available at the time of the decision, that the covered employee's performance can be completely discounted as a contributing factor to the accident".

Issued on: July 28, 1995.

Gordon J. Linton,
Administrator.

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